No. 2704.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling,

Plaintiffs in Error,

vs.

Elizabeth Knudsen,

Defendant in Error.

BRIEF IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

R. W. KEMP and
DAVIS, KEMP & POST,
Attorneys for Plaintiffs in Error.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

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Defendant's motion to dismiss the writ of error in this case is based upon the ground that the order appealed from is not a final order. We contend that the order appealed from is a final order and that the writ of error will lie to review the action of the District Court.

In the case of Stroheim *et al.* v. Deimel *et al.*, 77 Fed. Rep., p. 802, which was a civil action instituted under the statute of the state of Illinois, similar to the California statute, wherein the defendant in that action

was arrested and was, on motion, discharged from custody, the court said, at page 805:

> "If the proceedings in the Circuit Court had been by *audita querela,* in accordance, it would seem, with the better practice, a right to a writ of error would have been beyond question. As made upon motion the order of discharge was no less final in its character and effect."

While it is the general rule that the whole controversy must be settled between the parties before a writ of error will lie, still there are numerous exceptions to the rule and we contend that the present case is one of the exceptions, and that in all cases it is not necessary that the whole controversy between the parties be settled before an appeal or writ of error will lie. It depends wholly upon the nature of the order or judgment made as to whether or not it is final.

In the case of Hove v. McDonald, 109 U. S. 150, the court said, at page 155:

> "The first matter to be determined is the motion on the part of the receiver to dismiss the appeal for the reason that he was not a party to the suit. This motion would not prevail. The proceedings instituted by order requiring the receiver to file his account and the subsequent reference to that account to an auditor, and the exception thereto, were all directed against the receiver for the purpose of rendering him personally responsible for the fund which had been placed in his hands, and which he had delivered over in obedience to the original decree. It was a *side issue* in the cause in which the complainant on the one side and the receiver on the other were real and interested

parties. The decree confirming the auditor's report was, as to this matter, a final decree against the complainants and in favor of this receiver. We have so often considered cases of this sort arising incidentally in a cause, but presenting independent issues to be determined between the parties to them, that it is unnecessary to enter a detailed discussion of the subject at this time."

So in the case of Trustees v. Greenough, 105 U. S. 527, the court at page 531 says:

"The first question, however, is whether these orders do or do not amount to a final decree upon which an appeal lies to this court. They are certainly a final determination of the particular matters arising upon the complainant's petition for allowance and direct the payment of money out of the fund in the hands of the receiver, *though incidentally to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision.* The distribution of the fund for the benefit of the bond holders may continue in the court for a long time to come, dividends being made from time to time and payment of coupons still unsatisfied. The case is a peculiar one, it is true, but under all the circumstances, we think the proceedings may be regarded as so far independent as to make the decision a final decree for the purpose of an appeal."

In the case of City of Los Angeles v. Los Angeles City Water Company, 134 Cal. 121, which is an appeal from an order settling the accounts of a receiver, the court says, at page 123:

"That any party aggrieved by such order may appeal to this court therefrom is, however, well

settled. (Estate of Welch, 106 Cal. 427.) In Grant v. Superior Court, 106 Cal. 324, this court refused to prohibit the Superior Court from making an order fixing the compensation of a receiver, giving as a reason therefor that if the court should order it to be paid out of the fund in the receiver's hands, 'such order, under whatever name it might be designated, would be a final judgment upon a collateral matter arising out of the action, and would be appealable by any party interested in the fund,' and that as an appeal could be taken from such order, a writ of prohibition would not lie. This was a clear declaration that the order was appealable, although the time within which the appeal might be taken was not then before the court. (Citing Hove v. McDonald, 109 U. S. 150, *supra.)*"

The District Court of the state of California, in the case of German-American Bank v. Frank L. Eastman *et al.*, filed on December 21st, 1915, and reported in the advanced sheets of the California Decisions, vol. . . . ; in this case the respondents moved to dismiss the appeal upon the ground that the appeal was not taken from the final judgment. The court says:

"There are apparent exceptions to the rule relied upon by respondents herein, but they arise out of incidental or separate proceedings calling for orders of the court which are in the nature of judgments, but which are not part of the main controversy. Thus it has been held that an order requiring a party to pay the receiver of an insolvent corporation money held by it as agent of the insolvent at the time of the adjudication of insolvency, is an order from which an appeal may be taken. The court said: 'The theory upon which

the decision sustains such right of appeal by such a party from such an order, is that the order is in effect a final judgment against him in a collateral proceeding growing out of the action—is so far independent of the suit itself as to be substantially a final decree for the purpose of an appeal, although there has been no final decree in the suit. (Anglo Cal. Bank v. Superior Court, 153 Cal. 753.) * * * Another exception to the general rule is found in those cases where orders have been made refusing to allow the filing of a complaint in intervention, or judgment of dismissal has been entered against the intervenors after an order sustaining a demurrer to their complaint. It has been held that no reason exists requiring the party claiming the right of intervention to await judgment between the original parties to the litigation, and therefore that he should be allowed an immediate appeal. The order or judgment was considered to be final within the meaning of that provision of the code which allows an appeal from a final judgment. (Citing cases.)"

In the case of Anglo California Bank v. Superior Court, 153 Cal., page 753, the court says, at page 755:

"We can see no good answer to the claim made by defendants in their brief to the effect that plaintiff had the right to appeal from the order complained of, and therefore the writ of review was improperly issued. It is, of course, not disputed that if a party has the right of appeal from an order made in excess of jurisdiction, he cannot have such order reviewed in *certiorari* proceedings. Such is the express provision of our statute (Code Civ. Proc., sec. 1068), and it has been uniformly so held by this court. That an order of

> the character of the one under consideration is generally appealable by one affected thereby who is a party to the record is practically conceded by learned counsel for plaintiff, and it must be under the decisions of this court. The theory upon which the decisions sustain such right of appeal by such a party from such an order is that the order is in effect a final judgment against him in a collateral proceeding growing out of the action—is so far independent of the suit itself as to be substantially a final decree for the purposes of an appeal, although there has been no final decree in the suit."

In Grant v. Los Angeles etc. Ry. Co., 116 Cal., page 71, at page 72 the court said:

> "As to the order fixing the receiver's compensation, while not nominally one from which the statute authorizes a direct appeal, and while it sufficiently appears that it is not a special order made after final judgment, it is, nevertheless, an adjudication from which an appeal will lie. The order not only fixes compensation of the receiver, but taxes such compensation as costs in the action as against all parties, and directs and authorizes the receiver to apply towards its payment the balance of the fund remaining in his hands as such receiver. Such an order, however it may be designated, is in legal effect a final judgment upon a collateral matter arising out of the action and is appealable by any party interested in the fund."

So we contend that the order in the case at bar was a final determination of a collateral matter arising in the cause and the action of the court was a final determination of the rights of the plaintiffs in error. It was a proceeding collateral to the main issue in the

case and one that affected the rights of the parties, and the decision of the District Court was a final determination of the matters before the court, and unless reviewed by the Appellate Court and if allowed to become a final judgment, or until the final determination of the action, would be conclusive upon the plaintiffs in error and *res adjudicata* as to the matters decided therein. This proceeding could not be reviewed upon appeal from the final decree in the action, but would be *res adjudicata* as to the matters decided therein, and hence it necessarily follows that such order of the court was a final determination of the issues between the parties upon this collateral matter and is in effect a final judgment.

Respectfully submitted,

R. W. KEMP and

DAVIS, KEMP & POST,

Attorneys for Plaintiffs in Error.